Key Laws That Trigger Consultation

Consultation "Triggers"

- Trust Responsibility
- Treaty Reserved Rights
- Laws:
  - NHPA, ARPA, NAGPRA, AIRFA, RFA, NEPA
- Executive Pronouncements:
  - Executive Orders:
  - Presidential Memos on Government-to-Government Relations

Origins of the Indian Trust Responsibility

- *Cherokee Nation v. Georgia* (1831)
  - neither states nor foreign nations
  - "domestic dependent nations"
  - "in a state of pupilage"
  - stand as a "ward to his guardian"

Origins of the Indian Trust Responsibility

- *Worcester v. Georgia* (1832)
  - Tribes separate & distinct political communities
  - Tribes sovereign over lands retained
  - Treaties intended to ensure availability of sustainable, land-based, traditional existence
  - *Duty of protection* bargained for consideration for land cessions

Paternalism Run Amuck

- Guardian-ward language serves as rationale for “plenary power” doctrine
- Major Crimes Act (1885)
  - Federal jurisdiction over crimes committed by Indians in Indian country
  - First intrusion into internal affairs of tribe
- General Allotment Act of 1887 (The Dawes Act)
  - Power to abrogate treaties unilaterally
  - Congress’ “perfect good faith” presumed

Dawes Act/General Allotment Act

- Regardless of treaty, the President has the authority to divide up the reservation lands and to allot them to individual tribe members
- The allotments are held in trust by the US for 25 years
- Tribe members will be subject to the laws of the state or territory where the allotment is located, they shall have equal protection of the laws, every Indian who lives apart from a tribe and adopted the habits of civilized life is a citizen of the United States

The Duty of Protection

- Against what?
  - Then: unrelenting pressure of immigrant intrusion
  - Now: environmental and other threats to tribal lands, resources, burials, and tribal interests

Satisfying the Duty of Protection

- Narrow view:
  - U.S. owes *general* trust responsibility to Indian tribes, but…
  - Absent a specific obligation, duty is discharged by compliance with general laws and regulations not aimed at Indians

- Query: What's become of the duty?

Satisfying the Duty of Protection

- Broader view:
  - Promise of protection "bargained for" consideration for land cessions
  - Compliance with laws of general applicability may not be enough
  - General trust responsibility may not be enforceable, but…
  - Agency discretion in imposing greater level of protection likely to be sustained

Exercising Discretion Consistent with the Duty

- Timber sales on former Klamath reservation
- Corps permit for fish farm in Puget Sound
- Emergency regulation of off-shore salmon fishing
- Coal leasing near Northern Cheyenne

The Upshot

- Trust responsibility shared by all federal agencies
- Agencies have broad discretion to consider duty
- Discretion exercised to protect tribal lands, resources, and cultural properties will be upheld
- Obligation to consult when tribal lands, resources, or cultural properties at risk
- Duty of protection may not be limited to specific statutory obligations (still broad trust responsibility)

“Great nations, like great men, should keep their word.”

--Justice Hugo Black (1960)

Treaty Reserved Rights

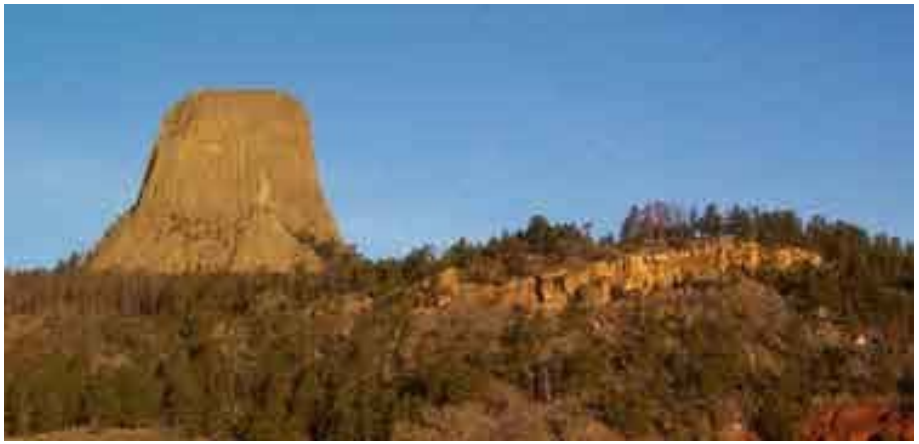
- Treaties are not grants of rights to the tribes, but reservations of rights not surrendered
  - Implied rights (e.g., water)
  - Express rights (e.g., off reservation fishing)

- Treaty tribes and other tribes

National Historic Preservation Act (1966)

- Purpose of NHPA:
  - Promote preservation
  - Consult SHPO/THPO before taking action
  - “Consider” effects
- Means:
  - §110: locate, evaluate, nominate, protect
  - §106: consult IAW 36 CFR Part 800
- Process
  - 36 C.F.R. part 800

NHPA, cont.



- ’92 Amendments enhanced tribal role
- Consult w/tribes re religious or cultural sites, wherever located - on or off tribal lands
  - Traditional Cultural Properties (NPS Bulletin 38)
  - *Pueblo of Sandia* case (50 F.3d 856)
  - *Muckleshoot Indian Tribe* case (177 F.3d 800)
- Concurrence role on Indian lands
  - THPO may assume SHPO role

Archaeological Resources Protection Act (ARPA, 1979)

- Purpose: Protect archaeological resources on public and Indian lands
  - 100 year-old remains of past human life of archaeological interest

- Notify tribe before issuing permit affecting any Indian religious or cultural site
  - If items found, NAGPRA or NHPA may kick in

- Tribal consent required on Indian lands

- Criminal and civil enforcement provisions

Native American Graves Protection & Repatriation Act (NAGPRA)

- Purposes:
  - Establish process for repatriation of human remains & cultural items
  - Protect human remains and cultural items recovered from federal and Indian lands

- Native American human remains & cultural items must be repatriated
  - Where lineal descendants or culturally affiliated tribe or Native Hawaiian organization
  - In custody of federal agencies or federally funded museums (Sections 5 and 6)
  - Inadvertently discovered or intentionally excavated on federal lands (Section 3)

American Indian Religious Freedom Act (AIRFA), 1978

- Protect right to exercise traditional religions
- Act creates no veto power, new substantive rights, nor enforceable procedural duties
- Duty to:
  - Consult with traditional religious leaders
  - "Consider" American Indian religious practices
- *Lyng* case (485 US 455 (1988) reduced import of the Act

Religious Freedom Restoration Act

- Government may substantially burden the exercise of religion if:
  - Compelling governmental interest, and
  - Uses least restrictive means
- *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008)
  - San Francisco Peaks sacred to at least 13 tribes
  - Use of treated sewage effluent to make snow would not "substantially burden" free exercise of religion by tribal members
- *Comanche Nation v. United States, 2008 WL 442661* (W.D. Okla)
  - Tribal Cultural Property on Army Post – Medicine Bluffs
  - Construction in viewscape of sacred bluffs is substantial burden

National Environmental Policy Act of 1969 (NEPA)

42 U.S.C. 4321 et seq. and 40 CFR Parts 1500 to 1508

- Purpose:
  Informed, transparent decision-making that considers environmental effects

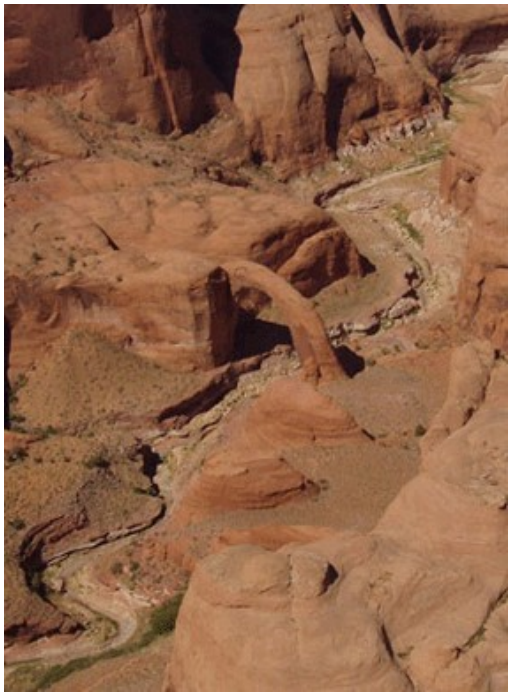
- Means:
  Written, public environmental analyses

National Environmental Policy Act of 1969 (NEPA)

- Consultation triggers:
  - Invitation to participate in scoping
  - Discuss conflicts w/ tribal land use plans and policies
  - Invitation to comment on draft EIS when affects on Indian lands
  - Notice of hearings, meetings, and docs when affects…
  - May be cooperating agency when affects…

Indian Sacred Sites

- E.O. 13007 (May 24, 1996) (Clinton)
- Obligations:
  - Notice of proposed actions that may limit access to or adversely affect sites
  - Accommodate access to & ceremonial use of Indian sacred sites by Indian religious practitioners
  - Avoid adversely affecting physical integrity of sacred



Consultation with Tribal Governments

- E.O. 13175 (November 6, 2000) (Clinton)
- Obligations:
  - Consult regarding regulations, proposed legislation, or other policy statements that may have substantial effects on tribes
  - Use consensual mechanisms to develop regulations and policies affecting:
    - treaty rights
    - tribal self-government
    - tribal trust resources

Environmental Justice

- E.O. 12898 (Feb 11, 1994) (Clinton)
- Purpose: Ensure minority or low-income populations do not suffer adverse environmental effects "disproportionately"
- Means:
  - Greater public participation and access to information
  - Analyze subsistence consumption of fish and wildlife

Other Executive Orders

- Cooperative Conservation (E.O. 13352) (Bush, 2004)
  - Take account of tribal interests in land and other natural resources
  - Promote tribal participation in Federal decision-making
- Preserve America (E.O. 13287, 2003) (Bush, 2003)
  - Partner with Indian tribes to promote economic development through use of historic properties

Presidential Memos on Government-to-Government Relations

- President Obama, October 30, 2009
  - Proclamation for National Native American Heritage Month
- President Bush, September 23, 2004
  - Respect tribal rights of self-government & self-determination
  - Cultivate mutual respect
- President Clinton, April 29, 1994
  - Consult prior to taking actions that affect tribes
  - Assess effect of actions on trust resources
- All recognize government-to-government relationship